

CHAPTER

4

A CRITICAL ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE REALISATION OF THE RIGHTS OF PERSONS WITH DISABILITIES IN ZIMBABWE

*Esau Mandipa**

Summary

Zimbabwe still has a long way to go with regard to full and effective realisation of the rights of persons with disabilities (PWDs) who have endured marginalisation for a long time. This article examines Zimbabwe's legal and institutional frameworks for the realisation of the rights of PWDs. It is an appraisal of Zimbabwe's laws and institutions for protecting disability rights in the light of the provisions of the United Nations Convention on the Rights of Persons with Disabilities (the CRPD). With the exception of the Constitution, laws that address disability in Zimbabwe predate the CRPD and are framed along the outdated medical model. State institutions tasked with the promotion and protection of PWDs' rights take disability issues as charity issues. The institutions have also not fared well in the past years with regard to the obligation to address marginalisation of PWDs. The time is opportune for Zimbabwe to embrace a human rights-based approach to disability. Equally, it is also an opportune time for Zimbabwe to assume the obligations towards PWDs under the CRPD by becoming a party thereto.

1 Introduction

Developments at an international level which culminated in the adoption of the United Nations Convention on the Rights of Persons with Disabilities (the CRPD)¹ have led to the confirmation of persons with

* LLB (Hons) University of Zimbabwe, LLM (Human Rights and Democratisation in Africa) University of Pretoria, SA. Disability Rights Lecturer, Faculty of Law, Midlands State University, Zimbabwe. A registered legal practitioner with the High Court of Zimbabwe.

1 The United Nations Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008.

disabilities (PWDs) as rights-bearers and valued members of society.² Indeed, the CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of PWDs in terms of human rights.³ It embodies a paradigm shift away from a social welfare response to disability to a human rights-based approach. However, it is regrettable to note that Zimbabwe is not yet a party to the CRPD.

PWDs have been portrayed as a historically disadvantaged group⁴ and continue to endure massive human rights violations in many countries. In the Zimbabwean context, PWDs are treated negatively and dehumanised. To start with, the birth of a child with a disability is normally associated with witchcraft, promiscuity by the mother during pregnancy, or punishment by ancestral spirits.⁵ Children born with disabilities are sometimes strangled to death after birth.⁶ Furthermore, there are also widespread reports of children with disabilities being hidden away by their parents when visitors arrive.⁷

It is a common misconception within the Zimbabwean society that PWDs are passive and economically unproductive, and therefore are a burden on the country.⁸ Given the fact that Zimbabwe is a country experiencing severe political and economic crisis and also faces unprecedented developmental challenges, PWDs tend to suffer more human rights violations compared to their non-disabled counterparts.⁹ Not surprisingly, many PWDs beg for alms in towns and cities. No wonder, PWDs in Zimbabwe have been described as 'the forgotten tribe'.¹⁰

Women and children with disabilities in Zimbabwe suffer more human rights violations as they have other vulnerabilities.¹¹ Women with disabilities suffer double discrimination, firstly as women, and secondly as

- ² MH Rioux *et al* (eds) *Critical perspectives on human rights and disability law* (2011).
- ³ R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons With Disabilities' (2008) 8 *Human Rights Law Review* 1 5.
- ⁴ C Ngwena 'Deconstructing the definition of disability under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613.
- ⁵ R Chimedza & S Peters 'Disabled people's quest for social justice in Zimbabwe' in F Armstrong & L Barton (eds) *Disability, human rights and education: Cross-cultural perspectives* (1999) 10-11.
- ⁶ See 'Woman drowns disabled toddler' *Chronicle* 22 August 2013.
- ⁷ Zimbabwe Human Rights Report 'Discrimination based on race, sex, religion, disability, language, or social status' available at <http://www.ncbuy.com/reference/country/humanrights.html?code=zi&sec=5> (accessed 7 April 2011).
- ⁸ R Lang & G Charowa 'DFID scoping study: Disability issues in Zimbabwe' (July 2007) http://www.ucl.ac.uk/lc-ccr/downloads/scopingstudies/dfid_zimbabwe/report (accessed 5 September 2013).
- ⁹ As above.
- ¹⁰ T Choruma *The forgotten tribe: People with disabilities in Zimbabwe* (2006) 5.
- ¹¹ Zimbabwe Human Rights Report (n 7 above).

persons with disabilities.¹² Cultural beliefs and practices weigh too heavily against the realisation of the rights of women with disabilities. Poverty, misery, illiteracy, joblessness and social exclusion are some of the common plights that women with disabilities face in Zimbabwe. Similarly, children with disabilities are normally not sent to school, compared to their non-disabled counterparts.¹³ Without the requisite knowledge and skills, it is very difficult if not impossible for the children to secure any form of employment when they grow up. In the end, a vicious cycle of poverty and disability is created. Yet both the Zimbabwean legal and institutional frameworks for the realisation of the rights of PWDs appear not to adequately address their plight.

The Disabled Persons Act of Zimbabwe (the DPA),¹⁴ which is the primary law dealing exclusively with disability matters, falls short of adequately addressing the human rights of PWDs. The major drawback of this Act is that it follows an outdated medical model of disability which locates disability within the person and views PWDs not as rights holders but as objects for clinical intervention.¹⁵ Furthermore, the government has not developed necessary administrative infrastructures for the effective implementation of the DPA.¹⁶

Other laws that address the issue of disability include the Constitution,¹⁷ the Children's Act,¹⁸ the Mental Health Act,¹⁹ the Social Welfare Assistance Act,²⁰ the State Service (Disability Benefits) Act,²¹ the War Victims Compensation Act²² and the Criminal Law (Codification and Reform) Act.²³ As will be shown, these laws have some shortcomings when it comes to the realisation of the rights of PWDs. Government has done little to ensure the effective implementation of the laws. It is a cause for concern that these laws predate the CRPD.

- 12 I Grobbelaar-du Plessis 'The African women with disabilities: The victims of multilayered discrimination' (2007) 22 *South Africa Publiekreg/Public Law* 405; SA Djouyou Kamga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope' (February 2011) *Barbara Faye Waxman Fiduccia Papers on Women and Girls with Disabilities, Center for Women Policy Studies* 3; R Traustadóttir 'Obstacles to equality: The double discrimination of women with disabilities' (July 1990) available at <http://dawn.thot.net/disability.html> (accessed 5 September 2013).
- 13 See 'The plight of deaf and dumb children in education' *Manica Post* 20 December 2011 where it is reported that 75 per cent of children with disabilities never complete primary school in Zimbabwe.
- 14 The Disabled Persons Act [Chapter 17:01], Act 5 of 1992.
- 15 G Quinn & T Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.
- 16 Lang & Charowa (n 8 above) 7.
- 17 Constitution of Zimbabwe, 2013.
- 18 The Children's Act [Chapter 5:06], Act 22 of 1971.
- 19 The Mental Health Act [Chapter 15:12], Act 15 of 1996.
- 20 The Social Welfare Assistance Act [Chapter 17:06], Act 10 of 1988.
- 21 The State Service (Disability Benefits) Act [Chapter 16:05], Act 22 of 1971.
- 22 The War Victims Compensation Act [Chapter 11:16], Act 22 of 1980.
- 23 The Criminal Law (Codification and Reform) Act [Chapter 9:23], Act 23 of 2004.

Apart from laws, a number of institutions have specific responsibilities towards the promotion and protection of the rights and welfare of PWDs. In the main, the institutions include the Ministry of Labour and Social Services, the National Disability Board, the Child Welfare Council, the courts and the recently appointed Special Advisor on Disability and Rehabilitation to the President and Cabinet (the Special Advisor). However, these institutions have also not fared well in addressing the marginalisation of PWDs in Zimbabwe.

Given this background, this article is an appraisal of Zimbabwe's legal and institutional frameworks for the realisation of the rights of PWDs. It has four sections starting with the introduction. The second section is a critical analysis of the legal framework for the realisation of the rights of PWDs in Zimbabwe. This section highlights the need for Zimbabwe to shift from the medical approach of disability to a human rights-based approach. Section three is a critical appraisal of the institutions that are legally or constitutionally tasked with the protection, promotion and fulfilment of the rights of PWDs. The final section is the conclusion. It proffers specific as well as general recommendations on how to achieve a more effective realisation of the rights of PWDs. The CRPD will be used as an analytical tool and yardstick for conducting the appraisal, notwithstanding that Zimbabwe is not a ratifying party.

2 Legal framework

2.1 The Constitution and disability provision

Prior to 2005, the non-discrimination clause in the Constitution of Zimbabwe did not include disability as one of the prohibited grounds. Following widespread campaigns by the National Disability Board and local Non-Governmental Organisations which deal with disability,²⁴ section 23 of the Constitution was amended in 2005 to include physical disability as a prohibited ground.²⁵ While the amendment was applauded for extending protection to disability,²⁶ questions were asked about its inclusiveness. Mental, intellectual, sensory and other types of disabilities, which are protected under the CRPD,²⁷ were implicitly placed outside the scope of constitutional protection. Quinn and Degener have observed that

²⁴ The National Association of Societies for the Care of the Handicapped (NASCOH) and the Southern Africa Federation of the Disabled (SAFOD) were among the NGOs that campaigned vigorously for the inclusion of disability as a ground upon which discrimination is prohibited in the Constitution.

²⁵ See The Constitution of Zimbabwe Amendment No 17, Act 5 of 2005, sec 4.

²⁶ See 'Constitution of Zimbabwe Amendment (no. 17) Bill, 2005 (hb 2005) – Representations made by the Zimbabwe Human Rights NGO Forum to the Portfolio Committee on Justice, Legal and Parliamentary Affairs' available at <http://reliefweb.int/sites/reliefweb.int/node/181818/.pdf> (accessed 15 August 2011).

²⁷ Art 1 of the CRPD.

equality norms in constitutions and legislation often fail to cater adequately for the diversity of disabilities.²⁸

In April 2013, Zimbabwe adopted a new Constitution²⁹ which came into force on 22 August 2013. The Constitution contains some improvements with regard to the realisation of the rights of PWDs. As a starting point, the Constitution recognises the inherent dignity and equal worth of each human being under the provision on founding values and principles. The recognition of the inherent dignity of all human beings is important especially for persons with mental disabilities who are normally treated without dignity.³⁰ More importantly, the Constitution also recognises the rights of PWDs among the founding values and principles.³¹ It can be submitted that there is at least recognition of disability rights and an appreciation of the equal worth of all human beings in Zimbabwe as opposed to the previous Constitution which did not expressly provide for the rights of PWDs in any section. In addition, the clause providing for the recognition of inherent dignity and equal worth of all human beings in the Constitution mirrors some of the general principles underlying the CRPD in article 3 namely, the respect for the inherent dignity and the acceptance of PWDs as part of human diversity and humanity.³²

Similarly, section 22 of the Constitution provides that all institutions and agencies of the government at every level must recognise the rights of persons with physical or mental disabilities, particularly their right to be treated with respect and dignity.³³ This is commendable in that the provision reinforces the equal worth of all human beings, hence the need to treat PWDs with dignity and respect. Unlike the previous position where the realisation of the rights of PWDs was restricted to the Department of Social Welfare, the Constitution mandates all governmental departments and their agencies to assist persons with physical and mental disabilities to achieve their full potential and to minimise disadvantages suffered by them.³⁴ The provision is commendable, given the fact that disability is an evolving, at times

28 Quinn & Degener (n 15 above) 16.

29 The new Constitution was adopted through a referendum held in April 2013. It received presidential assent on 22 May 2013. However, only some sections of the Constitution came into force on the day of presidential assent including the Bill of Rights in chapter 4 and a provision on elections in chapter 7. The Constitution as a whole document came into force on 22 August 2013.

30 It can be submitted further that the recognition of the inherent dignity of all human beings in the Constitution mirrors art 17 of the CRPD, which provides for the right of PWDs to have their physical or mental integrity respected.

31 Secs 3(1)(e) & 3(2)(i) of the Constitution.

32 Art 3(a) & (d) of the CRPD.

33 Sec 22(1) of the Constitution.

34 Sec 22(2) of the Constitution.

contentious, cross-cutting concept³⁵ that cannot be addressed by a single governmental department.

Furthermore, section 22 mandates all government institutions and agencies at every level to develop programmes for the welfare of persons with physical or mental disabilities especially work programmes consistent with their capabilities and acceptable to them or their representatives.³⁶ Government institutions and agencies are also mandated to consider the specific requirements of persons with all forms of disabilities as one of the priorities in developmental plans.³⁷ This appears to be a step forward in attempting to alleviate poverty among PWDs in Zimbabwe and to ensure inclusion and participation in society by PWDs. It can be submitted that the Constitution gives a mandate on the government and its agencies to protect and promote the rights of PWDs in its developmental policies and programmes and is in line with the general obligations of states under the CRPD.³⁸ In addition, the provision requires mainstreaming of disability rights in Zimbabwe and is in line with the CRPD which emphasises the importance of mainstreaming disability issues as a paramount part of the strategies of sustainable development.³⁹

With regard to official languages, the Constitution advances disability rights by making sign language one of the official languages of Zimbabwe.⁴⁰ In addition, the Constitution mandates the development of communication suitable for persons with physical or mental disabilities.⁴¹ It specifically mandates the state to take appropriate measures to ensure that buildings and amenities that are open to the public are accessible to PWDs.⁴² By providing a constitutional mandate on the state to ensure accessibility of buildings and amenities by PWDs, the Constitution is in line with article 9 the CRPD which provides for equal access to the physical environment, transportation, information and communications and other facilities so as to enable PWDs to live independently and participate fully in all aspects of life.⁴³

For the first time in the constitutional history of Zimbabwe, the Constitution contains a dedicated section on the rights of PWDs. Section 83 of the Constitution states that:

³⁵ See paragraph (e) of the Preamble to the CRPD; R Traustadóttir ‘From social policy to the human rights law of the 21st century’ in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities* (2009) 8.

³⁶ Section 22(3)(a).

³⁷ Sec 22(3)(b).

³⁸ In particular, see art 4(1)(c) of the CRPD.

³⁹ Para (g) of the Preamble to the CRPD.

⁴⁰ Section 6 of the Constitution.

⁴¹ Section 22(3)(c) of the Constitution.

⁴² Section 22(4) of the Constitution.

⁴³ Art 9 of the CRPD; see also art 3(f) of the CRPD, which makes accessibility one of the principles underlying the Convention.

The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realize their full mental and physical potential, including measures:

- To enable them to become self reliant;
- (a) To enable them to live with their families and participate in social, creative or recreational activities;
 - (b) To protect them from all forms of exploitation and abuse;
 - (c) To give them access to medical, psychological and functional treatment;
 - (d) To provide special facilities for their education; and
 - (e) To provide State-funded education and training where they need it.⁴⁴

Section 83 shows a constitutional commitment to address some of the major barriers to the equality of PWDs such as access to education and health facilities, exploitation and abuse, and the right to live with their own families. The state has an obligation to ensure that PWDs realise their full mental and physical capabilities. Provisions of section 83 confirm that Zimbabwe has begun to embrace a human rights approach to disability. In many respects, they complement a number of provisions of the CRPD, including: article 16 which provides for freedom from exploitation, violence and abuse; article 23 on the home and family;⁴⁵ article 24 providing for the right to education; and article 25 on the right to health.

However, while section 83 of Constitution makes the realisation of the economic, social and cultural rights of PWDs contingent upon resources that are available to the state, it does not underscore that the state has a duty to ensure the progressive realisation of such rights. This is a weakness that needs to be addressed. The position would have been better if the Constitution had conferred an obligation on the government similar to article 4 of the CRPD. Article 4 of the CRPD requires states parties to take measures to the extent of available resources with a view to achieve progressive realisation of economic, social and cultural rights.⁴⁶

Notwithstanding that Zimbabwe is moving towards a human rights-based approach, some of the Constitutional provisions are still aligned to the medical model of disability. The constitutional provision obliging the state to develop welfare programmes for persons with physical or mental disabilities appears to be aligned to an outdated approach which views disability as a welfare issue.⁴⁷ Also, it is not clear whether the concept of persons with ‘physical and mental’ disabilities in section 83 includes persons with intellectual and sensory disabilities. A holistic concept of disability should include intellectual and sensory disabilities and

⁴⁴ Sec 83(a)-(f) of the Constitution.

⁴⁵ Art 23(3) of the CRPD, which provides that PWDs have equal rights with respect to family life.

⁴⁶ Art 4(2) of the CRPD.

⁴⁷ Ngwena (n 4 above) 620.

disfigurement.⁴⁸ Furthermore, like the previous Constitution, the new Constitution does not address the plight of women and children with disabilities who suffer double discrimination. This is in contrast to articles 6 and 7 of the CRPD which make provision for these social groups. Also, the Constitution does not do enough to move away from a ‘special schools approach’ so as to clearly embrace inclusive education. Unlike article 24 of the CRPD which recognises a right to inclusive education, section 83 appears to reinforce the notion of separate education by its reference to ‘special facilities’.⁴⁹

2.2 The Disabled Persons Act

As indicated above, the DPA⁵⁰ is the major law that addresses disability in Zimbabwe. However, the DPA is not a human rights document in that it does not confer any rights to PWDs or confer any obligations on the state. The DPA also follows the outdated medical model of disability in all its provisions. For these reasons, the DPA should be repealed and substituted by an entirely new Act that is in line with the provisions of the CRPD.

Terminology matters when one is dealing with disability issues. According to Nyirinkindi, terms and labels become significant in colouring perceptions and determining what rights may be attached to PWDs.⁵¹ Although the term ‘disabled person’ is used by many disability activists and scholars, the manner in which it is used in the Act is pejorative and reflects a medical and diagnostic approach to disability which ignores the imperfections and deficiencies of the surrounding society. However, unlike the DPA, the Constitution makes use of the term ‘persons with disabilities’. It is therefore submitted that the DPA has to be in line with the Constitution.

A disabled person is defined as:

[A] person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability, which gives rise to physical, cultural or social barriers inhibiting him from participating at an equal level with other members of society in activities, undertakings or fields of employment that are open to other members of society.⁵²

⁴⁸ See art 1 of the CRPD which gives reference to physical, mental, intellectual and sensory impairments; H Combrinck ‘The hidden ones: Children with disabilities in Africa and the right to education’ in J Sloth-Nielsen (ed) *Children’s rights in Africa: A legal perspective* (2008) 303;

⁴⁹ Sec 83(e) of the Constitution.

⁵⁰ Act 5 of 1992.

⁵¹ L Nyirinkindi ‘A critical analysis of paradigms and rights in disability discourses’ (2006) 12 *East African Journal of Peace and Human Rights* 49 52.

⁵² Sec 2 of the DPA.

This definition follows the outdated medical model of disability as it fails to appreciate that disability is not only limited to individual impairments but also to barriers caused by both attitudinal and environmental factors. Kayess and French have observed that the medical model has been the most powerful influence in the conceptualisation of disability in modern history.⁵³

It is suggested that the name ‘Disabled Persons Act’ should be discarded in favour of the internationally preferred terms like ‘Persons with disabilities’.⁵⁴ It does not clarify the fact that disability results from the interaction between persons with impairments and their surrounding societies. Hence, the name ‘Persons with Disabilities Act’ should replace ‘Disabled Persons Act’.

The definition of disability under the DPA does not appreciate that disability is an evolving concept which changes over time. The Act should adopt a similar provision like article 1 of the CRPD which does not explicitly define PWDs but is rather indicative and inclusive. The CRPD states that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁵⁵

The CRPD does not define PWDs but rather indicates who they are in an inclusive fashion. This is a flexible approach as opposed to a single and fixed definition provided for under the Act.

The DPA establishes the National Disability Board (NDB)⁵⁶ which is empowered to issue and serve adjustment orders to ensure access to mainstream public services by all PWDs. The Act states that where the NDB considers that any premises to which members of the public are ordinarily admitted or any premises in which services or amenities are ordinarily provided to members of the public are inaccessible to PWDs, it may serve an adjustment order requiring the owner of the premises or the provider of the service to undertake action at his/her own expense to secure reasonable access by PWDs.⁵⁷ Due to the nature of many impairments, the inhospitable physical infrastructure, particularly in rural areas, profoundly hampers PWDs from accessing mainstream public services like health, education and justice. Adjustment orders have the

⁵³ Kayess & French (n 3 above) 6.

⁵⁴ See the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, A/RES/48/96 (20 December 1993) para 19 in which the use of terminology which reflects a medical and diagnostic approach and, ignores the deficiencies and imperfections of the surrounding society is castigated.

⁵⁵ Art 1.

⁵⁶ Sec 4 of the DPA.

⁵⁷ Sec 7 of the DPA.

capacity to assist PWDs in the realisation of the right to access mainstream public services and enable them to live independently and to participate fully in all aspects of life.

As part of the implementation measures of adjustment orders, section 7(8) of the DPA makes it a criminal offence to fail to comply with an adjustment order. It is also a criminal offence to deny PWDs admission into any premises to which members of the public are ordinarily admitted or to deny provision of any public service or amenity.⁵⁸ All these are positive steps to ensure the right of access to essential services by PWDs.

However, it appears that the criminalisation of failure to comply with adjustment orders under section 7(8) of the DPA is only a paper provision. There is no single prosecution to date that was based on the DPA.⁵⁹ Ultimately, the Act lacks a clear enforcement mechanism. Furthermore, the fact that the NDB cannot issue adjustment orders to state hospitals, clinics, nursing homes, schools or educational training centres without the consent of the relevant Minister of the institution concerned is a weakness.⁶⁰ Requiring ministerial consent effectively renders adjustment dependant on the political willingness of the government. Many government workplaces, magistrates offices and state recreational facilities are not accessible to PWDs.⁶¹ As an example, it is very difficult if not impossible for PWDs to access government offices at the Government Complex in Gweru.⁶² The complex has no guiding rails, the elevators have no recorded voices for persons with visual impairments and are too narrow to accommodate wheelchairs, and the toilet cubicles are too high for persons with physical disabilities.⁶³ As part of augmenting the effectiveness of the DPA, the NDB should be given power to issue adjustment orders against government institutions without ministerial consent. This will assist in increasing accessibility to state premises and services by PWDs.⁶⁴

Another weakness is that the DPA only makes provision for adjustment orders relating to already constructed buildings. It does not apply to new buildings under construction or to those to be constructed. Many new public buildings are inaccessible to PWDs. This has resulted in extreme difficulties to PWDs when it comes to access to public services.

58 Sec 8 of the DPA.

59 'Zimbabwe: Disabled Persons Act Defective' *The Standard* 22 January 2012 available at <http://www.allafrica.com/stories/201201230521.html> (accessed 7 February 2012).

60 Sec 7(7) of the DPA.

61 AH Eide *et al* 'Living conditions among people with activity limitations in Zimbabwe: A representative regional survey' available at <http://www.safod.org/images/lczimbabwe.pdf> (accessed 25 July 2011).

62 This is the building that houses most of the government ministries in the Midlands province of Zimbabwe.

63 This is a personal observation that was made by the author during a visit to the Complex.

64 Eide *et al* (n 61 above).

Furthermore, the Act does not cover private entities that offer facilities and services to members of the public.

A revised Act should therefore make provisions for prohibiting the construction of inaccessible public buildings or private entities in which services are ordinarily offered to members of the public or in which members of the public are ordinarily admitted. It means that all the architects, construction engineers and others who are professionally involved in the design of buildings should have the necessary knowledge on disability issues.⁶⁵ Building standards regulations should also encompass disability as opposed to the current regulations which are silent on standards for promoting accessibility.

A new Act should address not just inaccessible buildings but also roads and other transportation systems, information, communications and other pertinent services to render them accessible to PWDs. Article 9 of the CRPD, which provides for appropriate measures to be taken to ensure that PWDs have access on an equal basis with others to the physical environment, transportation, information, communication technologies and other services are accessible to the public, contains standards for guiding Zimbabwe in ways that are human rights-compliant.⁶⁶

Apart from the problem of inaccessible buildings and modes of communication, the DPA does not address the right to employment for PWDs. Apart from merely prohibiting discrimination against PWDs in employment,⁶⁷ the Act does not require the state to safeguard and promote the realisation a right to work as is the case under article 27 of the CRPD.⁶⁸ Moreover, the DPA does not provide clear guidance on how equality and non-discrimination in the workplace is to be achieved. Article 27 of the CRPD, which articulates the scope of the duty to provide reasonable accommodation for job applicants and employees with disabilities, is a source of human rights standards for domestic states to emulate.⁶⁹

The DPA is silent on education. It has been reported that one in three children with disabilities is out of school and that 75 per cent of children with disabilities never complete primary school in Zimbabwe.⁷⁰ Although

65 See the Standard Rules (n 54 above) Rule 5.

66 Art 9 of the CRPD.

67 Sec 9 of the DPA.

68 Art 27(1) of the CRPD.

69 Art 27(1) of the CRPD guarantees PWDs the right to work on an equal basis with others. It also further states that work environments should be open, inclusive and accessible to all PWDs.

70 'The plight of deaf and dumb children in education' (n 13 above); Eide *et al* (n 61 above) 70-72, states that the proportion of those who have never attended school is almost three times higher among PWDs as compared to the non-disabled.

inclusive education⁷¹ has been actively considered since 1994, there is still a lot of scepticism about and ambivalence towards its implementation within the education sector.⁷² It appears that inclusive education is not part of the training component for teachers in most of the teachers' colleges in Zimbabwe. As a result, teachers graduate from the training colleges without the requisite skills and competences to teach inclusive classes.⁷³ A new Act should ensure that inclusive education is made an integral part of the education system. Guidance can be taken from the CRPD which advocates an inclusive education system at all levels.⁷⁴ The CRPD also provides for the realisation of the right to education without discrimination and on the basis of equal opportunities for PWDs.⁷⁵ A provision similar to that in the Ugandan Constitution which specifically provides for the right to education of all may be appropriate for Zimbabwe.⁷⁶

The proposed new Act should also address the issue of expensive and inadequate supply of aides and appliances like mobility aides, devices and prosthetics.⁷⁷ For persons with albinism, the major barrier is that of very expensive and inaccessible sunscreen products including skin lotions.⁷⁸ The reality in Zimbabwe is that there are high unemployment rates.⁷⁹ For the few who are employed, the situation is worsened by poor salaries. This means that the majority cannot afford aides and appliances for PWDs. The Act should include a state obligation to subsidise the purchase of aides and appliances which are in short supply and are very expensive. Such a move will assist to ease the suffering of PWDs and give them self-determination. This will also go a long way in increasing the level of independence in the daily lives of PWDs and the exercise of their further rights.⁸⁰

Another gap in the DPA is that it does not expressly provide for wide participation of PWDs and their organisations in decision-making or implementation of disability-related policies.⁸¹ This is in contrast to article 4 of the CRPD which calls for the involvement of PWDs and their representative organisations in implementation of disability-related

71 According to R Rieser *Implementing inclusive education: A Commonwealth guide to implementing article 24 of the UN Convention on the Rights of People with Disabilities* (2008) 2, inclusive education is a process of responding to the diversity of needs of learners through increasing participation in learning, cultures and communities, and reducing exclusion. The ultimate goal of inclusive education is that schools accommodate all children in spite of their differences.

72 O Mafa 'Challenges of implementing inclusion in Zimbabwe's education system' available at <http://www.onlineresearchjournals.org/IJER/abstract/2012/may/Mafa.htm> (accessed 17 January 2013).

73 O Mafa (n 72 above) 19.

74 Art 24 of the CRPD.

75 Art 24(1) of the CRPD.

76 The Constitution of the Republic of Uganda, 1995 sec 30.

77 Lang & Charowa (n 8 above).

78 'The agony of being an albino' *NewsDay* 20 July 2011.

79 The World Bank estimates that the unemployment rate in Zimbabwe is 85 per cent. See <http://data.worldbank.org/country/zimbabwe> (accessed 5 September 2013).

80 See the Standard Rules (n 54 above) Rule 4.

81 Choruma (n 10 above) 10.

legislation and policies.⁸² The failure to provide for the participation of PWDs in disability issues defeats the clarion call of the disability movement, namely, ‘nothing without us about us’.⁸³

2.3 The Mental Health Act

This Act⁸⁴ provides for the consolidation and amendment of the law relating to the care, detention and after-care of persons who are ‘mentally disordered’ or ‘intellectually handicapped’, whether for the purposes of treatment or otherwise.⁸⁵ It also provides for the establishment of various Boards including the Mental Hospital Board and the Special Boards. The Mental Hospital Board is tasked with the treatment, rehabilitation and general welfare of ‘mental patients’ amongst other functions,⁸⁶ whilst the Special Boards make reports in relation to ‘mental patients’ detained in various institutions.⁸⁷ In addition, the Act establishes the Mental Health Review Tribunal which primarily presides over applications and appeals made by or on behalf of ‘mental patients’ detained in institutions concerning their treatment or general welfare or for release from detention.⁸⁸

The care, detention and after-care of persons who are ‘mentally disordered’ or ‘intellectually handicapped’ as advocated for by this Act⁸⁹ assists persons with mental disabilities in the realisation of the right to the highest attainable standard of health. Similarly, rehabilitation as advocated for by the Act⁹⁰ is in order to enable persons with mental disabilities to attain and maintain maximum independence, and social and vocational ability.⁹¹ However, the Act also has shortcomings. The Act provides for involuntary treatment of persons with mental and intellectual disabilities in that it does not contain provisions for consent to treatment. By making provisions for the detention of persons with mental disabilities in special institutions separated from the mainstream healthcare facilities, the Act has a discriminatory orientation in which there is a parallel healthcare system that secludes persons with mental and intellectual disabilities. Discrimination against persons with mental or intellectual disabilities is prohibited under the CRPD. Article 25 of the CRPD provides for the enjoyment of the right to the highest attainable standard of health

82 Art 4(3) of the CRPD provides that states parties have a mandate to closely consult and actively involve PWDs when it comes to development and implementation of legislation and policies addressing disability. See also art 33 of the CRPD.

83 See Kayess & French (n 3 above) 4; Lang & Charowa (n 8 above) 29.

84 Mental Health Act [Chapter 15:12], Act 15 of 1996.

85 See the Preamble to the Act.

86 Secs 68(1) & 69-72.

87 Sec 73.

88 Secs 75-81.

89 See the Preamble to the Act.

90 See Part II of the Act.

91 See art 25 of the CRPD which provides for health-related rehabilitation.

without discrimination on the basis of disability.⁹² Similarly, seclusion and involuntary treatment of persons with psychosocial disabilities has been found by United Nations treaty monitoring bodies to constitute torture and ill-treatment.⁹³

Like the DPA, terminology used by the Mental Health Act is at variance with the best practices at the international level. Terms such as ‘mentally disordered,’ ‘intellectually handicapped,’ or ‘mental patients,’ demean, degrade, belittle, stigmatise and devalue persons with mental and intellectual disabilities. Pejorative terms disempower rather than empower PWDs. Terms like ‘persons with a mental disability’ or ‘persons with an intellectual disability’ should substitute the ‘mentally disordered’, ‘intellectually handicapped’ or ‘mental patients’.

Section 30 of the Mental Health Act provides for the indefinite detention of prisoners found to be ‘mentally disordered’ or ‘intellectually handicapped’ in special institutions. This is a clear violation of the right to liberty, amongst other rights. The CRPD provides that the existence of a disability must not justify deprivation of liberty in any circumstance.⁹⁴ The Mental Health Act should, therefore, be amended so as to be in line with the CRPD.

2.4 The Social Welfare Assistance Act

The Social Welfare Assistance Act⁹⁵ provides for the granting of social welfare assistance to ‘destitutes’ or ‘indigent persons’,⁹⁶ and their dependents. Social welfare may be provided in the form of cash, food, clothing, rehabilitation, occupational training or the provision of orthopaedic and orthoptic appliances.⁹⁷ The Act classifies ‘physically and mentally handicapped’ persons as ‘destitutes’ or ‘indigent persons’ who are therefore eligible to receive social welfare assistance from the Department of Social Welfare.⁹⁸ It is very clear that the Act was drafted alongside a misconception that disability is always associated with indigence. Disability may be associated with poverty but it is not always the case. In any event, the Department of Social Welfare, which is tasked with the provision of social welfare assistance, ‘is probably the most impoverished

⁹² See art 25 of the CRPD.

⁹³ See ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading Treatment or punishment’ A/HRC/22/53 available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed 17 May 2013).

⁹⁴ Art 14(1)(b) of the CRPD.

⁹⁵ n 20 above.

⁹⁶ According to sec 2, a destitute or indigent person has been defined as any person who lacks means of subsistence.

⁹⁷ Sec 5 of the Act.

⁹⁸ Section 6 of the Act. Other groups who are eligible to receive social welfare include people who suffer continuous ill-health or persons over 60 years of age.

and demoralised of all government departments'.⁹⁹ It lacks adequate resources,¹⁰⁰ such that the capacity of the Department to alleviate poverty and protect, promote and fulfil the rights of PWDs is highly questionable.

The Act follows the outdated medical model of disability which depicts PWDs not as subjects with legal rights but as objects of welfare.¹⁰¹ It fails to reorient the focus from needs to rights. As long as PWDs are portrayed as incapable of supporting themselves and are always made objects of charity or welfare, it becomes very difficult to talk of their human rights. This disempowering approach is in direct contrast to the principles underlying the CRPD like respect for independence of PWDs, individual autonomy, inherent dignity, and full and effective participation and inclusion in society.¹⁰² By way of illustration, the rights to live independently and to be fully included in the community which are guaranteed under the CRPD¹⁰³ cannot be realised if PWDs are assumed to be objects of social welfare or charity.

Requiring the Act to treat PWDs as rights-holders rather than indigents who are the objects of charity is not to deny the link between disability and poverty. PWDs are amongst the World's 'poorest of the poor'¹⁰⁴ and this is equally true in the Zimbabwean context in which PWDs are highly vulnerable to poverty.¹⁰⁵ By making provision for social welfare assistance in the form of cash, supply of food and other assistance to PWDs,¹⁰⁶ the Act makes a positive contribution towards the adoption of measures that have the capacity to reduce poverty as advocated for at the international level.¹⁰⁷

2.5 The State Service (Disability Benefits) Act

This Act¹⁰⁸ provides for payment of monetary compensation on the death or disablement of members or former members of the Defence Force, the Police Force and the Prison Services. It also provides for monetary compensation on the death or disablement of any person whilst assisting

99 King George VI School and Centre for Children with Physical Disabilities 'Disability in Zimbabwe' available at <http://www.kinggeorge6.org/home/the-centre/disability-in-zimbabwe> (accessed 9 April 2011).

100 As above.

101 Quinn & Degener (n 15 above) 1.

102 Art 3 of the CRPD.

103 Art 19 of the CRPD.

104 WHO 'Global Programming Note 2006-2007: Call for resource mobilisation and engagement opportunities' available at http://www.who.int/nmh/donorinfo/vip_promoting_access_healthcare_rehabilitation_update.pdf.pdf (accessed 5 September 2013).

105 NASCOH 'Disability in Zimbabwe' available at <http://www.nascoh.org.zw/?Pageid=82> (accessed 9 April 2011); Choruma (n 10 above) 12.

106 Sec 5 of the Act.

107 Art 28 of the CRPD.

108 The State Services (Disability Benefits) Act (n 21 above).

the mentioned forces and services.¹⁰⁹ The Act provides for vocational training and a temporary allowance for such training to the permanently disabled members of the mentioned forces.¹¹⁰ Vocational training includes any form of education or training which permits a disabled person to support himself or herself, and his/her dependants or will increase his/her capacity to do so.¹¹¹ The provision of vocational training as advocated for by the Act has the capacity to assist PWDs to attain and maintain maximum independence and full inclusion and participation in all aspects of life as to complement best practices at the international level.¹¹²

Furthermore, the Act also provides for a clothing allowance.¹¹³ In the event that the condition of a disabled person who is eligible for compensation under the Act requires the wearing of, say, an artificial limb or to use crutches or any other appliance which may result in tear of the clothing, a clothing allowance is provided for. This sounds positive and limits the financial burden upon PWDs.

However, the tone of the Act appears to make reference to physical disability only and disregards other types of disabilities recognised at an international level like mental, intellectual or sensory disabilities.¹¹⁴ As has been argued above, physical disability is not the only form of disability. The Act makes reference to disabilities arising only from physical injuries. In the First Schedule¹¹⁵ of the Act, reference is made only to physical injuries like loss of limbs and legs in the ascertainment of the degrees of disablement for compensation purposes. Another concern is that the Act lacks an enforcement mechanism. A common problem with the laws that address disability in Zimbabwe is that paper provisions are not translated into actual benefits for PWDs.

In addition, disablement for the purposes of the Act has been defined as permanent injury or disfigurement.¹¹⁶ This again means that those members who acquire physical disabilities which are long-term or short-term but not necessarily permanent are not covered by the Act. The Act's cover is very limited in scope. It is suggested that the Act should follow the CRPD which makes reference to long-term impairments as opposed to permanent impairments.¹¹⁷

¹⁰⁹ Sec 37 of the Act.

¹¹⁰ Sec 26 of the Act.

¹¹¹ Sec 13 of the War Victims Compensation Act (n 22 above).

¹¹² Art 26 of the CRPD, which calls for the need to ensure vocational ability to PWDs.

¹¹³ Sec 31 of the State Services (Disability Benefits) Act.

¹¹⁴ See sec 15 and the First Schedule of the Act, which gives an outline of the degrees of physical disablement that will be considered before compensation is payable. This has been done to the expense of other types of disabilities like mental or sensory.

¹¹⁵ The First Schedule is the standard form that is used in ascertaining the degrees of disablement under the Act.

¹¹⁶ Sec 2 of the State Services (Disability Benefits) Act.

¹¹⁷ Art 1 of the CRPD.

2.6 War Victims Compensation Act

The War Victims Compensation Act¹¹⁸ provides for the payment of compensation in respect of disablement or deaths of persons caused by war. If a disability results from the repercussions of war, the victim is entitled to monetary compensation after the assessment of the degree of disablement by the Commissioner of War Victims Compensation.¹¹⁹

The Act is the only domestic law that makes special provisions for women with disabilities (WWDs) and children with disabilities (CWDs), albeit it is in the context of disabilities directly or indirectly linked to war.¹²⁰ The Act provides for generous monetary compensation to disabled women.¹²¹ In addition to monetary compensation, it makes provision for an educational allowance for children who acquire disabilities as a result of war.¹²² The educational allowance is also available to children with disabled parents who are entitled to compensation under the Act.¹²³ Although the Act is silent on the underlying reasons for having special provisions for women and children with disabilities, it may be argued that it appreciates the double marginalisation of these two groups of PWDs in a way that complements international best practices.¹²⁴ It is widely recognised that WWDs and CWDs are among the social groups that require particular attention and support as they are doubly marginalised.¹²⁵

Like the State Service (Disability Benefits) Act, discussed earlier, the Act appears to make explicit reference to physical disabilities only and is therefore narrow in its scope.¹²⁶ Also, the levels of monetary compensation under the Act have not been reviewed since the 80s. The absence of review so as to cater for inflation and currency depreciation¹²⁷ shows a lack of seriousness in the implementation of the Act.

118 n 22 above.

119 Sec 12 of the Act.

120 Part VI of the Act.

121 Sec 24(1) of the Act.

122 Secs 25 & 26 of the Act.

123 Sec 26(1) of the Act.

124 Articles 6 & 7 of the CRPD, which provide specifically for women and children with disabilities, respectively.

125 Djoyou Kamga (n 12 above); Traustadóttir (n 12 above).

126 See sec 7 and the First Schedule of the Act for the assessment of degrees of physical impairments.

127 In March 2009, Zimbabwe experienced hyperinflation up to 24 000 per cent. Zimbabwe then adopted a multi-currency regime which saw the United States Dollar, South African Rand and the Botswana Pula being used as the official currencies. See 'How Zimbabwe lost control of inflation' *Newzimbabwe* 11 December 2009 available at <http://www.newzimbabwe.com/pages/inflation180.17386.html> (accessed 25 August 2013); 'Currency regime: Where do we go now from here?' *Zimbabwe Independent* 1 March 2012.

2.7 Criminal Law (Codification and Reform) Act of 2004

This Act¹²⁸ regulates criminal conduct in ways that extend specific protection to PWDs in respect of some offences. Sexual conduct involving a ‘mentally incompetent’ adult is charged as rape, aggravated assault or indecent assault, as the case may be, and is punishable under the Act.¹²⁹ The Act is welcome in as much as it strives to protect the rights to privacy, not to be treated in an inhuman and degrading manner,¹³⁰ bodily integrity and dignity of women with ‘severe’ intellectual disabilities who are commonly victims of rape as they may not be in a position to positively identify the perpetrators.¹³¹ Given the position that women with a ‘severe’ intellectual disability may not be competent and compellable witnesses before the courts,¹³² the Act extends protection to a class of person that may not be able to resist or report forced sexual violence.

However, the Act falls short of the international standards as it does not guarantee protection to women with disabilities in general. It should be amended so as to include all women with disabilities.¹³³ The Constitution requires the state to protect PWDs from all forms of exploitation and abuse.¹³⁴ The state has a constitutional obligation to take positive measures for the protection of women with disabilities from sexual abuse.¹³⁵

Another gap in the Act is that the disability of a rape victim is not included amongst the aggravating factors to be considered by a judge or magistrate when meting out an appropriate sentence to the accused under the Act.¹³⁶ To assist with deterrence, the disability of a victim should be treated as an aggravating factor. In addition, the language of the Act should be amended so as to remove offensive terms such as ‘mentally incompetent adult’ in favour of language that is aligned to the CRPD.

¹²⁸ The Criminal Law (Codification and Reform Act) (n 23 above).

¹²⁹ Sec 64 of the Act.

¹³⁰ On top of being an inhuman and degrading treatment, rape has also been classified as torture in the cases of *Aydin v Turkey* ECHR (25 September 1997) and *Mejia v Peru* IACtHR (25 November 2004).

¹³¹ See AL Pillay ‘Competency examinations with rape survivors having mental retardation’ available at <http://behavmed.ukz.ac.za/upload/> (accessed 8 May 2011), in which it is indicated that women with mental retardation are commonly victims of rape due to the inability to protect themselves, insufficient understanding of sexual behaviour and the fact that they are stigmatised, marginalised and vulnerable to exploitation.

¹³² Sec 246 of the Criminal Procedure and Evidence Act [Chapter 9:07].

¹³³ See art 16(2) of the CRPD, which mandates the putting in place of measures to prevent all forms of abuse, violence or exploitation and gives reference to gender-and age-sensitive assistance and support.

¹³⁴ Sec 83(c) of the Constitution.

¹³⁵ See also art 16(1) of the CRPD, which places an obligation on states parties to take measures to protect PWDs from all forms of exploitation, violence and abuse.

¹³⁶ Sec 65(2) of the Act.

3 Institutional framework

3.1 The National Disability Board (NDB)

As has been indicated above, the DPA establishes the NDB,¹³⁷ its main functions being, amongst others, to formulate and develop measures and policies that are designed to achieve equal opportunities for PWDs by ensuring that they obtain education and employment. It is also tasked to ensure that PWDs participate fully in sporting, recreational and cultural activities and are afforded full access to community and social services, and to issue the above-discussed adjustment orders.¹³⁸ These objectives are in line with the principles outlined under the CRPD especially equality of opportunity of PWDs and accessibility.¹³⁹

The NDB has achieved some success although it has not made enough of an impact. It lobbied successfully for the inclusion of PWDs in the Constitution which saw persons with physical disabilities being included in the non-discrimination clause. It established the Disability Fund in 2003 and 2006 and received funding from the national reserves¹⁴⁰ and it also successfully lobbied for the inclusion of children with disabilities in the Basic Education Assistance Module (BEAM).¹⁴¹

However, the NDB is largely invisible due to lack of resources. It operates under the financially ailing Department of Social Welfare. From its introduction in 1992, the NDB has not had an office to operate from.¹⁴² It also does not have a secretariat of its own and the Minister of Labour and Social Services (the Minister) is yet to appoint the Director for Disabled Persons' Affairs.¹⁴³ In addition, it appears that the Minister has more powers on the operations of the NDB. Not only does the Minister appoints members of the Board but he/she also appoints the Chairperson and the Deputy,¹⁴⁴ can assign personnel from his/her ministry to perform secretarial and administrative functions of the Board,¹⁴⁵ and records of meetings of the Board must be furnished and kept by the Minister.¹⁴⁶ It is

¹³⁷ Sec 4 of the DPA.

¹³⁸ Sec 5 of the DPA.

¹³⁹ See arts 5 & 9 of the CRPD.

¹⁴⁰ Lang & Charowa (n 8 above) 31.

¹⁴¹ According to N Marongwe 'Observatory Case Studies: The Basic Education Assistance Module (BEAM) in Zimbabwe' available at http://www.aidsandemergencies.org/cms/documents/5_Agency.pdf (accessed 10 October 2011), BEAM is the largest form of educational assistance in Zimbabwe that was launched by the Government as a response to the worsening social conditions and high drop outs of school children.

¹⁴² P Chitambara 'Social Protection in Zimbabwe' available at <http://www.tedriz.co.zw/index.php?option=com> (accessed 20 May 2013).

¹⁴³ In terms of sec 3 of the DPA, there has to be a Director for Disabled Persons' Affairs constituting part of the Public Service.

¹⁴⁴ Sec 4(3) of the DPA.

¹⁴⁵ Sec 4(7) of the DPA.

¹⁴⁶ Sec 4(5)(b) of the DPA.

the Minister who approves every cost to be incurred by the Board.¹⁴⁷ This means the NDB cannot make its own decision but has to rely on the Minister's instructions. The Minister is the only one administratively responsible for the NDB. Consequently, the effectiveness of the NDB overly depends on whether the Minister has a full appreciation of disability issues. The perception is that the NDB has been neglecting disability issues and this has impacted negatively on the realisation of the rights of PWDs generally.¹⁴⁸

As part of reform, the NDB should, therefore, be empowered to issue adjustment orders against governmental institutions without the consent of the ministers such that the process becomes speedy. The NDB should have autonomy in making disability-related decisions as opposed to reliance on the Minister's instructions. In its work, the NDB also needs to have a mechanism for monitoring its resolutions. Recently, the NDB resolved that the Zimbabwe Revenue Authority (ZIMRA) ought to exempt PWDs from paying import duty on vehicles imported by PWDs. This resolution has not been implemented and yet no action has been taken.¹⁴⁹ Generally, the objectives of the NDB need to be broadened so as to include the monitoring and enforcement of the rights of PWDs and their entitlements in Zimbabwe.

3.2 The Child Welfare Council: Inadequate protection of the rights of CWDs

The major Act which deals with children's issues in Zimbabwe is the Children's Act.¹⁵⁰ This Act establishes a Child Welfare Council (CWC)¹⁵¹ with one of its functions being 'to promote and encourage the co-ordination of the activities of organisations which have the promotion and protection of the rights of children as their object'.¹⁵²

However, the composition of the CWC does not expressly include organisations which deal with the rights of children with disabilities. Section 2A(1)(C) simply states that six representatives from Private Voluntary Organisations (PVOs) or other organisations which the Minister¹⁵³ considers deal with issues concerning the welfare and upbringing of children form part of the membership of the CWC. It is submitted that there are many organisations in Zimbabwe that deal with issues of welfare and upbringing of children which are not necessarily

147 Sec 5(c) of the DPA

148 According to Lang & Charowa (n 8 above) 30-31, the NDB is invisible and since 1994, the Social Welfare staff have been working on other responsibilities to the detriment and neglect of disability issues.

149 'The agony of being an albino' *NewsDay* 21 July 2011.

150 The Children's Act (n 18 above) as amended.

151 Sec 2A(1) of the Act.

152 Sec 2B(C) of the Act.

153 Minister refers to the Minister of Labour and Social Services.

DPOs or any representatives of PWDs. Furthermore, not all PVOs are aware of the rights and entitlements of children with disabilities. The Minister may therefore appoint any six organisations that do not deal with rights of children with disabilities as the members of the CWC. This may mean that the rights of children with disabilities may not receive special attention in the activities of the CWC.

There is therefore an urgent need revisit the Children's Act so that organisations that deal with the rights of CWDs or PWDs in general are clearly included in the composition of the CWC. This will go a long way in ensuring that the best interests of children with disabilities receive special attention in the functioning of the CWC. Given the position that the CWC is starved of resources, especially financial resources, specific funds should be channelled to the CWC for it to function properly. Finally, the suggested reforms should not be developed and implemented without the active involvement of PWDs and/or their representative organisations. As indicated earlier on, article 4 of the CRPD mandates active involvement and close consultation of PWDs, including children with disabilities, through their representative organisations when it comes to the development and implementation of disability-related legislation and policies.¹⁵⁴ This is in line with the clarion call of the disability movement which is 'nothing without us about us.'¹⁵⁵

3.3 The Special Advisor on Disability and Rehabilitation to the President and Cabinet

The recent establishment of the office of Special Advisor on Disability and Rehabilitation to the President and Cabinet is a highly positive development since the office acts as a focal point within government for the implementation of disability-related policies. This is in line with the CRPD which calls for focal points within governments for matters relating to the implementation of disability rights.¹⁵⁶

However, it is still not clear what the priorities of the new office are and whether it has any coherent strategies for addressing disability.¹⁵⁷ The qualifications of the incumbent of the office of Special Advisor are not clear. The current incumbent is Retired Brigadier-General Muchemwa who was appointed by the President. The activities of the Special Advisor are not yet known. According to Nilsson there is a need to question the role, mandate and appointment of this new office.¹⁵⁸

¹⁵⁴ Art 4(3) of the CRPD.

¹⁵⁵ See Kayess & French (n 3 above) 4.

¹⁵⁶ Art 33 of the CRPD.

¹⁵⁷ See Lang & Charowa (n 8 above) 29.

¹⁵⁸ S Nilsson & A Nilsson? 'Disability rights in Zimbabwe' (30 January 2011) available at <http://www.msc.st/docs/HRBA-Disability-Zimbabwe-revised-2011-01-30.doc> (accessed 25 July 2011).

It is suggested that the mandate of the Special Advisor should be clearly articulated. However, the articulation of such a mandate should not result in unnecessary duplication and overlapping of roles with that of the NDB, CWC and the Ministry of Labour and Social Welfare. Furthermore, in order to leave no room for political appointments, there is a need to come up with a clear criterion for the appointment of the Special Advisor. It is proposed that the Special Advisor has to be an individual who is suitably qualified and has extensive experience in the field of disability.

3.4 The Ministry of Labour and Social Services

The Ministry of Labour and Social Services is responsible for the rights and needs of PWDs in Zimbabwe. Together with the Ministry of Health and Child Welfare, it is responsible for the provision of wheelchairs and other assistive devices or appliances to PWDs among other activities. According to Eide *et al*, less than one fourth of PWDs who claimed that they need assistive devices have received them.¹⁵⁹ This shows that the Ministry is failing to deliver according to its responsibilities.¹⁶⁰ Furthermore, the Ministry has no budget at all addressing the needs of PWDs which may be the reason why it is failing in its obligations. In this regard, the Ministry is failing to live up to expected standards at the international level which require the availability of mobility aids, devices and assistive technologies to PWDs, amongst other essentials.¹⁶¹

It is suggested that the Ministry should have a specific budget catering for disability issues in Zimbabwe. The Ministry should also prioritise disability issues among its functions. The current position in which disability issues are relegated to the peripheries of the Ministry's priorities has to be changed.

3.5 Disability through the courts

Courts of law can play a very crucial role when it comes to the realisation of the rights of PWDs. In Zimbabwe however, it is regrettable that only one case on disability has been decided by the Supreme Court sitting as a Constitutional Court. This is the case of *Simon Mvindi & 5 Others v the President of the Republic of Zimbabwe & 3 Others*.¹⁶² The case arose during the disputed March 2008 elections. During the elections, ballot papers were not available in Braille, electronic format or any other form accessible to PWDs especially those with visual impairments. Instead, sections 59 and 60 of the Electoral Act [Chapter 2:13] required voters in need of assistance especially PWDs to be assisted by the Zimbabwe Electoral Commission

159 Eide *et al* (n 61 above) 103.

160 As above.

161 Art 4 of the CRPD.

162 SC 106/08.

officials and Police officers on duty at the polling stations in casting ballots but not by their chosen relatives or friends.

All six applicants in this case are persons with visual impairment who made a constitutional challenge to the provisions of sections 59 and 60 of the Electoral Act. They argued that the sections infringed their right to free expression of political will and the right to a secret ballot. The applicants further submitted that they preferred to be assisted by relatives or friends to cast ballots as opposed to polling and police officers who may be strangers to them. By way of remedy, the applicants wanted the sections of the Electoral Act to be declared unconstitutional because there was infringement of the constitutionally guaranteed right to free expression.¹⁶³

After making a finding that a myriad of factors like lack of accessible polling stations, lack of voting materials in accessible formats, lack of accessible campaign literature and inaccessible transportation to and from polling stations renders the right to vote by PWDs hollow, the Supreme Court found that PWDs have a right to vote in secret like any other person. The Court declared sections 59 and 60 of the Electoral Act null and void saying that the provisions violated the principle of secret ballot. Furthermore, government, through the electoral authority, and political parties were ordered to consider developing political communications and voting materials in sign language and ballot papers in large print or Braille.

The judgment is welcome in that it is in line with best practices at international level in which the right of PWDs to vote by a secret ballot and the use of appropriate assistive technologies are guaranteed.¹⁶⁴ However, government and political parties were not given any deadline to implement the decision and it is not clear whether the decision is going to be implemented at all.

4 Conclusion

Zimbabwe has a long way to go in improving the realisation of the rights of PWDs. The first recommendation is for Zimbabwe to be a party to the CRPD, since the Convention embodies the best practices for the realisation of the rights of PWDs. Ratification and the ultimate domestication of the CRPD will have far reaching implications for reform in Zimbabwe especially in major sectors like education, health, housing, employment and politics. This will ensure full and effective inclusion of PWDs in the facets of life.

¹⁶³ Sec 20 of the previous Constitution, which provided for the right to freedom of expression.

¹⁶⁴ See art 29 of the CRPD, which further states that PWDs should be assisted by persons of their own choice in the voting process.

The new Constitution of Zimbabwe is an improvement with regard to the realisation of the rights of PWDs. Section 83 has a disability focus. It imposes new obligations on the state including obligations to give PWDs access to medical treatment, education and to enable self-reliance. However, it is a major concern to note currently disability-related legislation in Zimbabwe predates the CRPD. The legislation was modelled along the outdated medical model of disability. There is therefore an urgent need to review the legislation and align it with the new Constitution and better still the CRPD.

Among the institutions dealing with disability, it can be submitted that the NDB and the Special Advisor need to have their objectives clearly articulated and even broadened so as to ensure the full and effective realisation of the rights of all PWDs in Zimbabwe. More referrals are needed on disability issues to the courts of law so as to provide impetus for the development of domestic jurisprudence on disability. There should be mainstreaming of disability as provided for under both the CRPD and the Constitution.

It is high time for Zimbabweans to be reminded that all human beings have something to contribute towards humanity and that social structures should be built inclusively with human empowerment as a key goal.¹⁶⁵ PWDs are equal members of society who have to be treated as rights-bearers always. Disability is a universal human experience.¹⁶⁶ It should be mainstreamed in major socio-economic areas like education, health, employment and political participation.¹⁶⁷

¹⁶⁵ Quinn & Degener (n 15 above) 12.

¹⁶⁶ See WHO International Classification of Functioning, Disability and Health available at <http://www.who.int/classifications/icf/en/> (accessed 16 August 2011).

¹⁶⁷ D Jones & L Webster 'A handbook on mainstreaming disability' available at <http://www.eldis.org/vfile/upload/1/document/0708/DOC23069.pdf> (accessed 6 September 2013).